No. 80-591

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

VALAD ELECTRIC HEATING CORPORATION,

Appellant,

vs.

TED R. BROWN & ASSOCIATES, INC. and MALLORY ENGINEERING, INC.,

Appellees.

On Appeal from the Supreme Court of Utah

APPELLEE, TED R. BROWN & ASSOCIATES, INC., MOTION FOR SUMMARY AFFIRMATION OF THE DECISION OF THE SUPREME COURT OF THE STATE OF UTAH, OR IN THE ALTERNATIVE, DISMISSAL OF THE APPEAL

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Ted R. Brown & Associates, Inc., Appellee, acting by and through its attorney, Allen H. Tibbals, of the firm of Tibbals, Adamson, Peters & Howell, under and pursuant to the provisions of Rule 16, of the Rules of the United States Supreme Court, moves the Court to summarily, without briefing or further argument before this Court, affirm the decision appealed from of the Utah Supreme Court on the ground that the decision has so manifestly correctly applied the law as enunciated by the Supreme Court of the United States on the matter of personal jurisdiction acquired under the Utah Long Arm Statute over the defendant, Valad Electric Heating Corporation, Appellant, on the undisputed facts that no further requirement or necessity exists for briefing and argument before this Court, or in the alternative that this Court dismiss the appeal on the

ground that no substantial federal question is involved. In support of this Motion, Appellee respectfully presents to the Court the following argument.

Examination of the Jurisdictional Statement furnished by the Appellant discloses that the sole basis for the appeal to the Supreme Court of the United States from the decision of the Utah Supreme Court, the highest Court of the State of Utah and Court of ultimate resort in that State, is prolongation of the defendant and Appellant Valad's refusal to accept the decision of the District Court and determination of the factual issues against the said Valad Electric Heating Corporation and the affirmance by the Supreme Court of the State of Utah of these factual issues as determined by the District Court.

The collateral factual issues which the Appellant Valad stresses in its Jurisdictional Statement have no bearing upon the resolution of the only Federal question raised, as to whether the rights of the defendant have been violated in enforcement of the personal jurisdiction gained over Valad under the Long Arm Statute. It becomes immaterial to consideration of the jurisdictional question as to whether the manufacture by Valad Electric Heating Corporation of the heaters which were the source of the litigation came about by reason of an order placed by Ted R. Brown & Associates, Inc. with Valad or whether they came about by virtue of a diagram and sketch submitted at the request of Brown by Valad to Mallory and then approved by Mallory for manufacture. The undenied and absolutely undisputed fact is that Valad Electric Heating Corporation of

Tarrytown, New York, did accept a contract or order to manufacture, in accordance with certain criteria furnished to Valad by the Utah corporation, Ted R. Brown & Associates, and its customer, Mallory Engineering, heaters to be built in accordance with the specifications furnished. It did manufacture some of the heaters and caused them to be delivered to Mallory in Utah.

All of the hocus-pocus engaged in by the defendant Valad and their counsel as to whether the order constituted the basis of the contract for the manufacture or whether Exhibit 83, an approved sketch of the heaters, constituted the basis of the contract between the parties is not germaine to this issue. The fact remains unassailed that Valad undertook to make the heaters for a Utah corporation, deliver the

product into the state of Utah, and guarantee its performance in the state of Utah. Of this there is no doubt and not one word set forth in the entire course of the Jurisdictional Statement filed by Appellant changes this factual picture. Having thus chosen to accept the responsibility to perform a contract for the manufacture of these heaters for a Utah corporation for delivery in Utah and use in Utah, it ill becomes Valad Electric Heating Corporation to say that it is unfair and unjust to require that corporation to respond in a Utah Court when it failed completely and totally to manufacture the product as it contracted to do.

All of the semantics indulged in by Valad in attempting to make it appear that there is something untoward or unconstitutional about the manner in which

the Utah Courts dealt with this matter are simply a means chosen by this defendant to further delay the ultimate result, which is that Valad is going to have to pay for its failure to manufacture the product that it agreed to manufacture in accordance with the requirements that the contract imposed. The recognized authority on Supreme Court Practice, Stern & Gressman, Fourth Edition, makes this statement:

> "The Supreme Court will not exert its jurisdiction merely to review a decision of a State Court upon a question of fact. And once a case is otherwise before it, the Court generally will not reexamine the state court's findings and conclusions of fact. Grayson v. Harris, 267 US 352, 358; Portland R. Co. v. Railroad Commission, 229 U.S. 397, 412; Fry Roofing Co. v. Wood, 344 U.S. 157, 160."

The authority continues:

> "But there are two major exceptions to the rule against reconsideration of findings of fact. The Supreme Court will review a

state court's findings where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. Fiske v. Kansas, 274 U.S. 380, 385-6. And see Creswill v. Grand Lodge, 225 U.S. 246, 261; Sterling v. Constantin, 287 U.S. 378, 398. Pursuant to the latter exception, the Court feels itself free to make an independent examination of the facts when necessary to decide whether a person has been deprived by a state court of a right secured by the Constitution. Norris v. Alabama, 294 U.S. 587, 590; Chambers v. Florida, 309 U.S. 227, 228-9; Ashcraft v. Tennessee, 322 U.S. 143, 147-8; Craig v. Harney, 331 U.S. 367, 373-4; Neimotko v. Maryland, 340 U.S. 268, 271; Haynes v. Washington, 373 U.S. 503, 515-516; Ker v. California, 374 U.S. 23, 34; New York Times Co. v. Sullivan, 376 U.S. 254, 285; Whitus v. Georgia, 385 U.S. 545; Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 121; Napue v. Illinois, 360 U.S. 264, 271-2, and cases cited. In the latter two cases, the court referred to 'the long course of judicial construction which establishes as a principle that

> the duty rests on this Court to decide for itself facts or constructions upon which Federal Constituional issues rest.'"

Clearly in this case, the facts upon which the Federal Constitutional question rests is whether the Appellant Valad did by contract voluntarily make and enter into an agreement to manufacture heaters for a Utah corporation to be delivered and warranted as to performance in the State of Utah to a Utah consumer thereby subjecting itself under the Long Arm Statute to the jurisdiction of the Utah Courts. This Constitutional question does not involve a determination of the legal niceties of the contract which are presented by the Appellant.

The jurisdiction of the Utah Court is based upon a very simple fact under the terms of the Utah Long Arm Statute. That

Statute provides at 78-27-24 Utah Code Annotated, 1953, as amended:

> "Any person, notwithstanding section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:
>
> (1) The transaction of any business within this state.
>
> (2) Contracting to supply services or goods in this state;. . ."

Stripping all of the unnecessary semantics indulged in by Valad in attempting to raise straw issues concerning the nature of the contract which it was to perform, the essential fact is that it knowingly, intentionally, and with full knowledge of the consequences, manufactured heaters for delivery to a Utah corporation for use by another Utah corporation to

which corporation, the first corporation had contracted to sell the said heaters. The heaters were to be used in a construction project then being performed in Utah. Valad further gave a certificate of performance directly to the ultimate user, Mallory, by which certificate it certified that:

> "Sheath temperatures will not exceed +250° F when operating at continuous full voltage with a 5FPS air volocity and a maximum air temperature of +160° F (a maximum air temperature of 200° F with a 21 kilowatt heater assembly)." (See paragraph number 7 and 20 in the Findings of Fact and Conclusions of Law of the District Court of the State of Utah as set forth at page 54a and 57a of Appellant's Jurisdictional Statement).

By contracting to perform as it did in manufacturing these heaters to the specification required and in certifying the same to perform in accordance with certain

requirements for Utah residents, Valad could reasonably contemplate and should have contemplated that it might be required to respond to Utah Courts if its performance was questioned by the Utah buyers.

The desperation of Valad to try and avoid its responsibility is probably no better portrayed than in the statement made at page 6 of the Appellant's Jurisdictional Statement:

> "'As between the plaintiff and the Defendant Valad, I indicated in chambers that I felt that the burden of persuasion in view of my rulings would be upon Valad to persuade me that they were not liable. (TR 631-632).'
>
> Apparently, under the Utah law as construed by the trial Court, Valad had the burden of proof."

For counsel for Valad to make such an unwarranted and absolutely unsustainable characterization of the trial Court's

action in this matter, is incomprehensible. The trial Court, after several days of trial, in instructing the several attorneys as to briefs which were to be filed and certain class of evidence which was to be introduced in futher proof of damages, made the remark quoted. By no reasonable construction could it be said that the Court changed the requirements of the law of the State of Utah as to "burden of proof". The suggestion was intended by the Court to be helpful in letting counsel know of the persuasion of the Court at that moment as a result of the trial to that point. In so doing, the Court was hoping to aid counsel in directing further testimony and in presenting briefs which might permit counsel to emphasize the points which would be helpful to the Court in evaluating the position of Valad. This is a

far cry from making a ruling on the burden of proof and is a deliberate distortion of the action of the trial Court.

The appeal of Valad is without merit. The decision should be summarily affirmed, or the case should be dismissed for want of a substantial Federal question.

Respectfully submitted,

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I hereby certify that I mailed two true and correct copies of the foregoing to each of the following:

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_____